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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-978

LOUIS H. BLAIR, Mayor of Falls Church, Virginia
DAVID MONTAGUE, Mayor of Hampton, Virginia
J. W. HORNSBY, JR., Mayor of Newport News, Virginia, etc., et al., *Petitioners,*

v.

GLORIA JOSEPH, JAMES ROBERT HOGGE, t/a/ MISS MASSEUSE, t/a BO-JAC, LTD., etc., et al., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP J. HIRSCHKOP
108 North Columbus Street
Post Office Box 234
Alexandria, Virginia 22313
(703) 836-5555
Attorney for Respondents

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STATEMENT OF THE CASE

Respondents hereby adopt the Statement of the Case as set forth in the Petition for a Writ of Certiorari, with the exception of the following, appearing in said Statement of the Case.

On Page 6, it is stated that the respondents' federal complaint "realleged the same constitutional infirmities", presumably in reference to the complaint in equity filed by Robert Kisley on November 14, 1972 in the Circuit Court of Fairfax County, Virginia. It is evident that this statement is clearly erroneous and

that it conflicts with the findings of fact of both the District Court decision in Civil Action No. 595-72-R (35a of Appendix to Petition) and the decision of the Court of Appeals (56a of Appendix to Petition).

With regard to the representation on Page 6 that "further proceedings in the state courts have been suspended pending determination" by the Federal Courts, the record reveals that concerning the criminal prosecution in the Circuit Court of Fairfax County, Virginia, a stipulation between counsel, including a counsel for the same parties as the Falls Church petitioners herein, was entered into to defer sentencing pending a decision on the merits by the Federal Courts and that a motion for a non-suit was entered by plaintiff with regard to the equity action. This is finally mentioned in the Petition at Page 12 under *Post Appeal Action.*

ARGUMENT

This case comes before this Court from an interlocutory appeal of the Court of Appeals for the Fourth Circuit. The petitioners fail to state any grounds as to why the immediate intervention of the Court is necessary or warranted and, in fact, the posture of the case in the Courts below is such that adjudication may be had on the merits without any extraordinary inconvenience to any parties of the action.

Moreover, the questions presented in the petition are based on misrepresentations of the opinions of the Court of Appeals.

Furthermore, a careful reading of the petition reveals that this Court is actually being asked to review findings of fact.

I. The Immediate Intervention of This Court Is Not Necessary.

The petitioners fail to give any reason why there is such a question of immediacy that this cause should be heard before adjudication on the merits. None of the plaintiffs in any federal complaints originally heard by the two District Courts are in any different position than they were when the complaints were filed. Respondents refer the Court to the memorandum opinion of the District Court in *Joseph* v. *House,* Civil Action No. 595-72-R (35a) wherein the Court states, "the status quo to be preserved is the non-enforcement of the ordinance." See also Court of Appeals opinion (56a) which affirms this finding. There is no indication in the petition that this situation is working any undue hardship on the City of Falls Church, Virginia.

Similarly, the parties to the complaints filed in the District Court, Civil Action Nos. 42-72-NN and 48-72-NN, are in no different position then when the complaint was filed by virtue of the fact that on remand from the Court of Appeals, the District Court again denied the prayers for injunctive relief.

There is no reason, therefore, to ignore the well recognized proscription against piecemeal review.

II. Petitioners' First Question, That of Whether Summary Affirmance by This Court Is a Decision Involving Merits, Although an Important Question, Is Not Germane to This Case.

A careful reading of the opinion of the Court of Appeals (56a) reveals that this quetsion is truly non-existent. The petitioners indicate that the Court of Appeals' stance on the import of a summary ruling

by this Court was the determining factor in its refusal to treat this Court's dismissal of *Kisley* v. *City of Falls Church, Virginia*, 212 Va. 693, *app. dism.*, —— U.S. ——, 93 S.Ct. 237 (1972) as adjudication on the merits in the federal complaint in Civil Action No. 595-72-R. In fact, the Court stated:

> Even if our decision in *Hall* [v. *Thornton*, 445 F.2d 834 (4 Cir. 1971)] commits us, generally, to treat summary dismissal for want of a substantial federal question as an adjudication on the merits, we should not treat the Supreme Court's dismissal in *Kisely* as an adjudication on the merits. This is so because an examination of the opinion of the Supreme Court of Virginia . . . shows that, at least, some of the federal claims sought to be litigated . . . were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court. (65a)

Petitioners ignore the facts that there are different parties from Kisley raising issues of first impression herein.

As the District Court noted:

> In the absence of an order in the state court allowing a class action, such parties may if jurisdiction be present litigate their alleged controversy in the federal courts, including suits centering about ordinances which previously withstood attacks by other parties. *Carter* v. *City of Fort Worth*, 456 F.2d 572 (5 Cir. 1972); *Jeffreys* v. *Swank*, 337 F. Supp. 1062 (D.C. Ill. 1971). (42a).

Petitioners, further ignoring the fact that Kisley is no longer a party herein, maintain in their petition that this Court considered the merits of this issue in deciding there was "no substantial federal question."

Petitioners must know this to be a misstatement of this Court's action. The Court held that in their refusal to review the matter, *not in ruling on the merits,* that there was want of a substantial federal question. A substantial federal question does not exist when issues are raised in the Supreme Court below or where the Supreme Court below fails to treat such questions and the Supreme Court treats them as not having been raised below. See Stern and Gressman, *Supreme Court Practice,* §§ 3.25-3.32. Thus, Stern and Gressman, quoting from language of the Supreme Court, state in § 3.25 that:

> It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question have been properly raised in the state Court proceedings. . . . A federal issue not meeting these standards is deemed insubstantial and is cause for dismissal of an appeal . . . .

Petitioners are aware that the statutory and constitutional claims advanced in the United States Supreme Court in the prior Kisley appeal had not, indeed, been treated by the Virginia Supreme Court and there is substantial question as to whether they were indeed raised there. Accordingly, the question of the Supremacy Clause, Article VI Section 2 of the Constitution of the United States or the right of privacy under the Ninth Amendment to the Constitution of the United States were never previously raised in the Supreme Court of Virginia or of the United States. Similarly, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 e and the violation because of sex discrimination of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States were not raised by Robert

Kisley's counsel in the Virginia Supreme Court. This is not altered by the disingenuous treatment of the Title VII claim on Page 24, F.N. 4 of the petition.

Finally, the question of preemption by State criminal statutes, embodied in Title 18.1 of the Code of Virginia, of the massage ordinances herein were not raised in the Supreme Court of Virginia, although they were raised in the Supreme Court of the United States for the first time in the prior Kisely petition. These latter points, not previously adjudicated, were the major reasons for the Supreme Courts in California, *Lancaster* v. *Municipal Court,* 100 Cal. Rptr. 609, 6 Cal. 2d 809 (1972) and Washington, *Lacey* v. *J.S.K. Enterprises,* 6 Wash. App. 43, 492 P.2d 600 (1972) and a United States District Court in Texas, *Corey* v. *Dallas* 352 F.Supp. 977 (N.D. Tex. 1972) recently invalidating almost identical ordinances.

It is evident that the disputed matter of law as stated in the petition is a mere question of fact passed upon and decided correctly by the Court of Appeals. The petition states no compelling reason why this Court should ignore the usual rule that a writ of certiorari will not be granted to review evidence and discuss specific facts. *United States* v. *Johnston,* 268 U.S. 220. *National Labor Relations Board* v. *Waterman S.S. Corporation,* 309 U.S. 206 (1940).

III. The Refusal of the Court To Abstain From Consideration of the Federal Complaint Was Based Upon Finding of Fact and Not a Question of Law.

The petitioners contend that th Court of Appeals misapplied the doctrine of *Younger* v. *Harris,* 401 U.S. 36 (1971). In fact, the Court of Appeals' decision affirming the findings of the District Court in

Civil Action No. 595-72-R was based clearly on the finding of a fact situation which placed this case outside the scope of the *Younger* doctrine. Respondents feel that the opinions of both the Court of Appeals and the District Court in Civil Action No. 595-72-R correctly construe the law in terms of the *Younger* doctrine and rely on said well reasoned opinions in lieu of further argument. See also *Pugh* v. *Rainwater*, 483 F.2d 778 (5 Cir. 1973).

CONCLUSION

For these reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

GLORIA JOSEPH,
ROBERT HOGGE
t/a MISS MASSEUSE,
t/a BO JAC, LTD.,
By Counsel

Counsel for Respondents:

PHILIP J. HIRSCHKOP
108 North Columbus Street
Post Office Box 234
Alexandria, Virginia 22313
(703) 836-5555